IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DORIS GRAHAM	:	CIVIL ACTION
	:	
v.	:	
	:	
GIANCARLO BAROLAT, M.D. and	:	
THOMAS JEFFERSON UNIVERSITY	:	
HOSPITAL	:	No. 03-2029

MEMORANDUM AND ORDER

HUTTON, S.J. November 17, 2004

Presently before the Court are Defendant Thomas Jefferson University Hospital's ("TJUH") Motion for Summary Judgment (Docket No. 20), Plaintiff's Response thereto (Docket No. 40), and Defendant Thomas Jefferson University Hospital's Reply to Plaintiff's Response (Docket No. 45).

I. BACKGROUND

On March 28, 2003, Plaintiff initiated this suit against Defendants Giancarlo Barolat, M.D., and TJUH, alleging five counts arising out of a series of surgeries performed on Plaintiff by Dr. Barolat. In December of 1996, Plaintiff first saw Dr. Barolat for treatment of facial pain. As part of this treatment, Plaintiff was admitted to TJUH for spinal cord stimulator implant surgery on June 9, 1997. During this procedure, Dr. Barolat implanted a spinal stimulator device and placed electrodes in Plaintiff's body. On June 12, Dr. Barolat performed an additional procedure on Plaintiff where he attached

a pulse generator to the electrodes. The pulse generator was secured in a Dacron pouch. Plaintiff maintains that she continued to experience pain after the surgery. On December 3, 1998, Dr. Barolat removed the pulse generator and electrodes. It is uncontested that Dr. Barolat did not remove the Dacron pouch he had inserted on June 12, 1997. Plaintiff maintains that she continued to feel pain in her face and began to experience additional pain in her chest after the procedure in June of 1997. On March 30, 2001, Plaintiff was admitted to a South Carolina hospital for examination of a mass in her chest. Physicians at that hospital removed the mass. Plaintiff alleges that the mass was formed as a result of Dr. Barolat leaving the Dacron pouch in Plaintiff's body. Plaintiff is suing Dr. Barolat for medical malpractice. Plaintiff is suing Defendant TJUH under the theories of corporate liability, vicarious liability, and ostensible agency arising out of the injuries that Plaintiff sustained.

II. LEGAL STANDARD

When considering a motion for summary judgment, a court must consider "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The court must determine whether the evidence is such that a reasonable jury

could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In making this determination, the court must view all of the facts in the light most favorable to the non-moving party and all reasonable inferences must be drawn in favor of the non-moving party. Id. Once the moving party has met the initial burden of demonstrating the absence of a genuine issue of material fact, the non-moving party must establish the existence of each element of its case. J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1531 (3d Cir. 1990) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)). Nonetheless, a party opposing summary judgment must do more than just rest upon mere allegations, general denials, or vague statements. See Trap Rock Indus., Inc. v. Local 825, 982 F.2d 884, 890 (3d Cir. 1992). If the non-moving party's evidence "'is merely colorable, . . . or is not significantly probative, . . . summary judgment may be granted.'" Id. at 890-91 (quoting Gray v. York Newspapers Inc., 957 F.2d 1070, 1078 (3d Cir. 1992)).

III. DISCUSSION

A. Corporate Negligence Claim

The Supreme Court of Pennsylvania has held that a hospital can be directly liable for negligence that occurs within its walls. See Thompson v. Nason Hosp., 591 A.2d 703, 708 (Pa. 1991). The court explained that:

[c]orporate negligence is a doctrine under which the

> hospital is liable if it fails to uphold the proper standard of care owed the patient, which is to ensure the patient's safety and well-being while at the hospital. This theory of liability creates a nondelegable duty which the hospital owes directly to a patient.

Id. at 707. Under Thompson, a hospital owes a patient the following four duties ("Thompson duties"):

> 1) to use reasonable care in the maintenance of safe and adequate facilities and equipment; 2) to select and retain only competent physicians; 3) to oversee all persons who practice medicine within its walls as to patient care; and 4) to formulate, adopt and enforce adequate rules and policies to ensure quality care for the patients.

Welsh v. Bulger, 698 A.2d 581, 585 (Pa. 1997) (quoting Thompson, 591 A.2d at 707).

The doctrine of corporate negligence was explained further by the Pennsylvania Supreme Court in Moser v. Heistand, 681 A.2d 1322 (Pa. 1996). The court reiterated that under the theory of corporate negligence, the hospital is directly liable, as opposed to vicariously liable, for its own negligent acts. Id. at 1325. The court stated that "[b]ecause the duty to uphold the proper standard of care runs directly from the hospital to the patient, an injured party need not rely on the negligence of a third-party, such as a doctor or nurse, to establish a cause of action in corporate negligence." Id. Corporate negligence is based instead on the negligent acts of the corporation. A cause of action for corporate negligence "arises from the policies, actions or inaction of the institution itself rather than the specific acts of individual hospital employees." Id. at 1326.

Finally, in Welsh, the Pennsylvania Supreme Court addressed

the type of evidence necessary to prove a claim of corporate negligence. The court held that "unless a hospital's negligence is obvious, a plaintiff must produce expert testimony to establish that the hospital deviated from an accepted standard of care and that the deviation was a substantial factor in causing the harm to the plaintiff." Welsh, 698 A.2d at 585.

Therefore, in order to present a prima facie case of corporate negligence, a plaintiff must introduce evidence that: 1) the hospital breached one of the four recognized duties of care, 2) the hospital had actual or constructive notice of the defects or procedures that created the harm, and 3) the conduct was a substantial factor in causing the harm. See Thompson, 591 A.2d at 707-08; see also Engel v. Minissale, 1995 WL 478506, *2 (E.D. Pa. 1995). Furthermore, in presenting this evidence, unless the hospital's negligence is obvious, an expert witness is required to establish prongs one and three. See Welsh, 698 A.2d at 585-86.

Count four of Plaintiff's complaint alleges that TJUH violated the second, third, and fourth Thompson duties. Regarding the second duty, to select and retain only competent physicians, Plaintiff states that TJUH breached this duty by "hiring and maintaining as a member of its staff Dr. Barolat, who did not possess and employ the necessary skills and practices prevailing in his field of specialization." Pl.'s Comp. ¶ 49(a).

Initially, the Court notes that Plaintiff has not given the

Court an expert report which specifically addresses the negligence of TJUH. The only expert report before the Court is that of Plaintiff's expert Dr. Rawlings, which Defendant TJUH filed as an exhibit to its motion for summary judgment. See Def.'s Mot. for Summ. J. Ex. D. Dr. Rawlings states in his report that Dr. Barolat's treatment of Plaintiff breached the accepted standard of care. See id. However, Dr. Rawlings does not specifically mention how TJUH breached its duty to hire competent physicians. See id. Because there is no expert report before the Court which indicates that TJUH breached its duty, Plaintiff has failed to establish a prima facie case of corporate negligence under the second duty.

Even if the breach was obvious so that an expert report was not necessary, Plaintiff has not provided any evidence that TJUH knew or should have known that Dr. Barolat was incompetent. A hospital is not directly liable simply because a physician makes a mistake which allegedly constitutes malpractice. See Edwards v. Brandywine Hosp., 652 A.2d 1382, 1386-87 (Pa. Super. Ct. 1995). Plaintiff states in her response motion that Dr. Barolat "has also been sued for malpractice a number of times prior to the instant case." Pl.'s Resp. at 4. However, at the summary judgment stage, Plaintiff must do more than rely solely on bare allegations in a response. For example, in Corrigan v. Methodist Hosp., 869 F. Supp. 1208 (E.D. Pa. 1994), the plaintiff withstood a motion for summary judgment because an expert stated that the

hospital had breached its duty by credentialing a doctor with previous medical malpractice suits brought against him. Id. at 1211. Although Plaintiff argues Corrigan is authoritative, the plaintiff there presented the court with at least two expert reports detailing the hospital's negligence. See Corrigan, 869 F. Supp. at 1211. There is nothing in the record before the Court to show that Dr. Barolat actually had previous malpractice suits against him. Because the record before the Court lacks proof of any previous suits against Dr. Barolat, Plaintiff has not established the prima facie case for a violation of the second Thompson duty.

Plaintiff next alleges that TJUH violated the third Thompson duty to "oversee all persons who practice medicine within its walls." Thompson, 591 A.2d at 707. Specifically, Plaintiff states that TJUH failed to "adequately supervise and monitor Dr. Barolat" and failed to "supervise its agents, servants, workmen, employees and/or ostensible agents." Pl.'s Comp. ¶¶ 49(b) and 49(e). Apart from these allegations in the complaint, Plaintiff has not provided the Court with any evidence that TJUH breached its duty to oversee those who practice medicine within its walls. The only expert report discusses Dr. Barolat's breach of the standard of care owed to Plaintiff. This is not enough to show that TJUH, as a corporate entity, was negligent in supervising its agents. Since the breach is not obvious, and Plaintiff has not provided an expert opinion that TJUH breached the third

Thompson duty, Plaintiff has failed to make out a prima facie case on this claim.

Finally, Plaintiff argues that TJUH breached the fourth Thompson duty to "formulate, adopt and enforce adequate rules and policies to ensure quality care for the patients." Thompson, 591 A.2d at 707. Specifically, Plaintiff states that TJUH failed to "properly instruct its agents, servants, workmen, employees and/or ostensible agents in the procedures for properly evaluating and treating the Plaintiff" and failed to "create and enforce required and necessary rules . . . for ensuring that its patients receive the most appropriate medical treatment." Pl.'s Comp. ¶ 49(g) and 49(I). Dr. Rawlings stated in his expert report, to a reasonable degree of medical certainty, that Dr. Barolat "breached the standard of care with regard to Ms. Graham by failing to remove the Dacron pouch." Def.'s Mot. for Summ. J. Ex. D. In discussing treatments for complex pain syndrome, he stated that:

> even if the treatment is unconventional, certain basic surgical premises must still be followed. One of these premises is the fact that no foreign body should be left in situ unless the patient benefits from its presence or unless its removal would damage the patient. Dr. Barolat ignored this basis surgical tenet.

Id. In discussing this breach, Dr. Rawlings' report says that the "mesh should have been easily visualized and easily removed." Id.

When reviewing expert opinions, the Supreme Court of

Pennsylvania has stated that it is "not necessary for the expert's report to contain 'magic words' or to set forth their opinions in any specific manner." Welsh, 698 A.2d at 585-86. The court in Rauch v. Mike-Mayer, 783 A.2d 815 (Pa. Super. Ct. 2001) was faced with an expert report that criticized the attending physicians for failing to get "medical clearance" before administering general anesthesia. See Rauch, 783 A.2d at 827. The expert stated in the report that:

> the standard of care from my experience as both an E.R. doctor and internist required medical clearance. It was substandard to perform general anesthesia on this patient without medical clearance. . . The risk to this patient would have been significantly reduced by medical clearance and optimization of blood pressure and cardiac function as well as by regional anesthesia.

Id. at 827. In interpreting the report, the court found that this criticism of the physician related to the duty of a hospital to "formulate, adopt and enforce adequate rules and policies to ensure quality care for the patients." Id. Because the doctor failed to get medical clearance, the court found it possible that the hospital failed to have a set policy in place requiring this clearance. Id. at 828. Similarly, here, Dr. Barolat's failure to remove the pouch was a deviation from the recognized standard of care. In the present case, as in Rauch, it is unclear whether there were proper standards in place regarding removal of foreign objects, or whether the physician defendant failed to follow specific hospital policies. See Rauch, 783 A.2d at 828. In either instance, as demonstrated through Dr. Rawlings' report,

TJUH failed to enforce adequate rules and policies so as to ensure quality care for its patients. Based on the evidence before the Court, a genuine issue exists as to whether this was solely a breach by Dr. Barolat or also a failure of TJUH to have an adequate policy in place.

Additionally, it is well settled in Pennsylvania that a "hospital staff member or employee has a duty to recognize and report abnormalities in the treatment and condition of its patients." Welsh, 698 A.2d at 586 n.13. If the "attending physician fails to act in accordance with standard medical practice, it is incumbent upon the hospital staff to so advise hospital authorities in order that appropriate action might be taken." Rauch, 783 A.2d at 828 (quoting Welsh, 698 A.2d at 586). A court may properly charge a hospital with constructive notice when it "should have known" of the patient's condition. Rauch, 783 A.2d at 828. Furthermore, the Rauch court noted that "constructive notice must be imposed when the failure to receive actual notice is caused by the absence of supervision." Id. at 828. The court analogized the failure to supervise and the failure to enforce adequate rules and policies in finding the hospital had constructive notice. See id. Here, there is exists an issue as to whether TJUH had actual notice of Dr. Barolat's decision to leave the pouch in Plaintiff's body, but TJUH must be deemed to have constructive notice where its failure to have an adequate policy in place or enforce an otherwise acceptable

policy caused the injury.

Finally, Plaintiff has established that the breach was a substantial factor in causing her injury. It is uncontested that Dr. Barolat left the pouch in Plaintiff's body. Additionally, Dr. Rawlings stated that leaving the pouch in Plaintiff's body was a direct and proximate cause of Plaintiff's injuries. See Def.'s Mot. for Summ. J. Ex. D. Although the report does not mention TJUH directly, this is a case where the injury is so "naturally and probably the result of the accident that the connection between them does not depend solely on the testimony of professional or expert witnesses." Matthews v. Clarion Hosp., 742 A.2d 1111, 1116 (Pa. Super. Ct. 1999) (finding no medical expert testimony necessary to establish causal link between falling off table and shoulder injury).

Since Plaintiff has established that TJUH breached a duty owed to her, that this breach was a substantial factor in causing her injury, and that TJUH had notice, Plaintiff has survived TJUH's motion for summary judgment on the fourth Thompson duty.

B. Vicarious Liability Claims

I. *Actual Agency Claim*

General agency principles apply to hospitals and physicians in Pennsylvania. See Tonsic v. Wagner, 329 A.2d 497, 501 (Pa. 1974). To establish actual agency in Pennsylvania, the employer must have controlled or had the right to control the physical conduct of the servant in the performance of his work. See

Simmons v. St. Clair Memorial Hosp., 481 A.2d 870, 874 (Pa. Super. Ct. 1984). Further, a physician may be an agent of a hospital if his duties "involve general administration of that hospital and giving treatment therein." Id. A person is a servant if the master "not only controls the result of the work, but has the right to direct the way it is performed." Woolfolk v. Duncan, 872 F. Supp. 1381, 1392 (E.D. Pa. 1995). In contrast, an independent contractor "retains exclusive control over the manner in which the work is performed." Id. Except where the facts are undisputed, the jury determines whether an agent is a servant or an independent contractor. Id. See also Feller v. New Amsterdam Cas. Co., 70 A.2d 299, 300-01 (Pa. 1950).

In Simmons, the court looked at several factors in determining whether a doctor was an actual agent including: 1) whether the doctor maintained an office at the hospital, 2) whether the doctor received a salary from the hospital, 3) whether the doctor held a supervisory position at the hospital, and 4) whether the doctor had responsibilities concerning hospital administration. See Simmons, 481 A.2d at 874. In Simmons, the doctor did not have an office in the hospital and did not receive a salary from the hospital, but was the Chair of the Department of Psychiatry at the hospital and was responsible for problems associated with hospital care. See id. at 874. The court found a factual dispute existed which required the issue to go to the jury. Id.

The evidence presented thus far does not clearly show whether Dr. Barolat was a servant or an independent contractor at TJUH. Defendant presented evidence that Dr. Barolat is an employee of Thomas Jefferson University, ("University"), but the relationship between TJUH and the University remains unclear.[1] In his deposition, Dr. Barolat stated that his paychecks come from the University and that the University employs him. Dr. Barolat Dep. at 7. However, he also stated that his salary is based in part on his teaching duties at the University and in part on his surgical practice. Id. Plaintiff presented additional excerpts from Dr. Barolat's deposition where he stated that he is on the faculty of TJUH and has been since at least 1998. Id. at 8. Additionally, Dr. Barolat stated that all of his surgical work is done at TJUH. Id. Based on these facts, the Court finds that there exists a genuine issue of material fact as to whether Dr. Barolat was acting as an actual agent of TJUH at the time of the incident in question. Defendant's summary judgment motion on that claim is denied.

ii. *Ostensible Agency Claim*

In Pennsylvania, a hospital may be held liable for the acts of an independent contractor, usually a doctor, if the plaintiff

[1] TJUH provided the Court with a copy of the articles of incorporation for TJUH in its reply motion. See Def.'s Reply Ex. C. However, this document does not resolve the issue regarding the relationship between TJUH and the University, especially since four of the twelve members on TJUH's board are University officials and the University is listed as the sole member of the Corporation. See Def.'s Reply Ex. C.

can show that the contractor was the ostensible agent of the hospital. See Capan v. Divine Providence Hosp., 430 A.2d 647, 649-50 (Pa. Super. Ct. 1980). To succeed on a claim against the hospital based on ostensible agency, the plaintiff must establish that 1) the plaintiff looked to the hospital, not the contractor, for care, and 2) the hospital held out the contractor as its agent. See id. at 649-50. The classic example is an emergency room situation where a patient enters a hospital emergency room and accepts care from the doctor that is assigned by the hospital. In these emergency situations, the patient is looking to the hospital for care and the hospital can be seen as holding out the doctor as its agent. See Corrigan v. Methodist Hosp., 869 F. Supp. 1208, 1213 (E.D. Pa. 1994).

TJUH alleges that Plaintiff has failed to demonstrate that she looked to TJUH for treatment. TJUH attached portions of Plaintiff's deposition as evidence that she initially sought treatment from Dr. Barolat. Def's Mot. for Summ. J. Ex. F. In her deposition, Plaintiff states that she first saw Dr. Barolat in December of 1996 at his private office because another physician referred her to him. Id. Plaintiff provided no evidence in response to TJUH's summary judgment motion to illustrate that she actually looked to TJUH for care, as opposed to Dr. Barolat. In cases similar to this, where the patient initially met with the physician, courts have held that the plaintiff did not look to the hospital for care. See Corrigan,

869 F. Supp. at 1213; see also Davis v. Hoffman, 972 F. Supp. 308, 312-13 (E.D. Pa. 1997). Most courts finding a genuine issue of material fact as to ostensible agency found such in the emergency room setting. See Capan, 430 A.2d at 650. As Plaintiff has not offered any evidence to indicate that she looked to TJUH for care, there is no genuine issue of material fact as to TJUH's liability under ostensible agency. Summary judgment on the ostensible agency claim is granted.

IV. CONCLUSION

For the reasons stated above, Defendant's motion is granted in part and denied in part.

An appropriate Order follows.

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FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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v.	:	
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GIANCARLO BAROLAT, M.D. and THOMAS JEFFERSON UNIVERSITY HOSPITAL	:	
	:	
	:	No. 03-2029

O R D E R

AND NOW, this 17th day of November, 2004, upon consideration of Defendant Thomas Jefferson University Hospital's Motion for Summary Judgment (Docket No. 20), Plaintiff's Response thereto (Docket No. 40), and Defendant Thomas Jefferson University Hospital's Reply to Plaintiff's Response (Docket No. 45), IT IS HEREBY ORDERED that Defendant's Motion is **GRANTED IN PART AND DENIED IN PART** as follows:

(1) Defendant's Motion for Summary Judgment on Plaintiff's Corporate Liability claim is:

(A) **GRANTED** to the extent that no genuine issue of material fact exists as to whether Defendant breached its duty to select and retain only competent physicians,

(B) **GRANTED** to the extent that no genuine issue of material fact exists as to whether Defendant

breached its duty oversee all persons who practice medicine within its walls as to patient care, and

(C) **DENIED** to the extent that a genuine issue of material fact exists as to whether Defendant has breached its duty to formulate, adopt and enforce adequate rules and policies to ensure quality care for the patients;

(2) Defendant’s Motion for Summary Judgment on Plaintiff’s Vicarious Liability claim based on actual agency is **DENIED**; and

(3) Defendant’s Motion for Summary Judgment on Plaintiff’s Vicarious Liability claim based on ostensible agency is **GRANTED.**

BY THE COURT:

S/_____
HERBERT J. HUTTON, S.J